

United States Sentencing Guidelines After *Blakely: Booker and Fanfan* — A Sketch

Updated March 21, 2005

Congressional Research Service

<https://crsreports.congress.gov>

RS21932



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Sentencing in federal court has been governed by the United States Sentencing Guidelines. The Supreme Court has upheld the Guidelines in the face of arguments that they constituted an unconstitutional delegation of authority and an affront to the separation of powers. Yet thereafter, the Court held that due process and the right to a criminal jury trial require that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. And for this reason, the Court, in *Blakely v. Washington*, found constitutionally wanting a state sentence imposed by operation of a legislative sentencing guideline procedure even though the final sentence fell beneath the maximum penalty assigned to the crime of conviction. In *Booker* the Court agreed that these principles apply to the federal Sentencing Guidelines and as a consequence the Guidelines must be considered advisory rather than mandatory. The Court's later decision in *United States v. Shepard* may offer some clue as to further development of the *Apprendi/Blakely* principles.

This report is an abridged version — without footnotes — of CRS Report RL32573, *United States Sentencing Guidelines and the Supreme Court: Booker, Fanfan, Blakely, Apprendi, and Mistretta*.

RS21932

March 21, 2005

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Background of the United States Sentencing Guidelines

The Sentencing Reform Act of 1984, which established the United States Sentencing Commission and authorized it to issue sentencing guidelines, brought about striking changes in federal sentencing law – consistent with the Supreme Court’s case law at the time. Sentencing under earlier law was considered inconsistent and uncertain. Different federal statutes set different maximum penalties for the same crime committed under different jurisdictional circumstances. At the same time, federal judges enjoyed virtually unlimited discretion to impose any sentence beneath the maximum established by statute. Once imposed, sentences were ordinarily beyond appellate review. Moreover, time actually served was a product of the parole laws under which a federal prisoner in spite of a facially longer sentence became eligible for parole after serving the shorter of 10 years, one third of his sentence, or the term set by the sentencing court. At the discretion of the Parole Commission, a prisoner might be paroled at any time after becoming eligible up to and until his mandatory release date, generally pegged at service of two-thirds of his sentence (or 30 years of each consecutive sentence of 45 years or more). Many in Congress came to conclude that the system did not work.

Congress responded with the Sentencing Reform Act. The act’s most dramatic change was the creation of the United States Sentencing Commission and the act’s insistence that federal courts impose sentences within the ranges dictated by the Commission’s Sentencing Guidelines, except in those cases marked by circumstances that the Guidelines failed to take into consideration. The act gave the Commission rather exact instructions as to the nature of the Guidelines it was to issue. The Guidelines, for instance, were to establish a sentencing range “for each category of offense involving each category of defendant,” and each of these was to be assigned a sentencing range in which the maximum term of imprisonment was to be six months more than the minimum term for the range. The Guidelines were predicated upon “sentencing factor” principles which case law at the time seem to accept.

Blakely, *Apprendi*, and Related Matters

Focused upon the prosecutor’s burden to prove each of the crime’s elements, the Supreme Court some time ago held that once the prosecution had done so no denial of due process occurred simply because the defendant, convicted of the crime, was subject to a mandatory minimum sentence based upon the prosecutor’s proof to the court (not the jury) of an additional sentencing factor (by a preponderance of the evidence), *McMillan v. Pennsylvania*. Moreover, at least when the sentencing factor was the fact of a prior conviction, the sentencing factors might be used to enhance maximum penalties as well as to establish minimum penalties. Thus, a majority of the Court saw no constitutional impediment in a statutory scheme that raised the maximum penalty of a crime from two years to 20 years based on the presence of a prior conviction established to the court’s satisfaction by a preponderance of the evidence, *Almendarez-Torres v. United States*.

Logical though it may have been in light of the Court’s precedents, a majority of the Court’s members became uneasy with the implications of *Almendarez-Torres* almost immediately and responded with *Apprendi*. Apprendi was convicted of shooting up the home of his African-American neighbors. There was evidence, which Apprendi disputed, that his crime was motivated by racial animus. Under New Jersey law, possession of a firearm for an unlawful purpose is a second degree crime, and, unless otherwise provided, is punishable by imprisonment for a term fixed at between 5 and 10 years. A second degree crime, however, carries an extended term of imprisonment if the court finds that it was committed by a defendant “acting with a purpose to intimidate an individual or group of individuals because of race.” A second degree crime found to have been committed under such circumstances carries a term of imprisonment fixed at between

10 and 20 years. Apprendi plead guilty under a multicount indictment which nowhere mentioned either the hate crime sentencing enhancement statute or the allegations which supported its application. Nevertheless, in the plea agreement the prosecution reserved the right to seek the hate crime enhancement and Apprendi reserved the right to challenge its constitutionality. The trial court sentenced Apprendi to a hate-crime-enhanced term of 12 years on one of the unlawful possession counts (which otherwise would have carried a maximum term of 10 years) and rejected his constitutional arguments.

The Supreme Court, in a decision written by Justice Stevens and joined by Justices Scalia, Thomas, Souter and Ginsburg, reversed and remanded. The Court declared that the jury trial and notification clauses of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments embody a principle that insists that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to the jury and proved beyond a reasonable doubt.” When the Court limited the *Apprendi* rule to facts which drove punishment beyond the applicable statutory maximum, it seemed to leave unscathed the federal Sentencing Guidelines that appear to operate only up to that maximum. The *Apprendi* dissenters, however, sensed a conflict with *Apprendi*’s underlying rationale. “The actual principle underlying the court’s decision,” the dissent opined, “may be that any fact (other than prior conviction) that has the effect, in real terms, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt.” If so the dissenters speculated, “[t]he principle thus would apply not only to schemes like New Jersey’s, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant’s sentence within the statutory range turns on specific factual determinations (e.g., *the federal sentencing guidelines*).”

Blakely

After *Apprendi*, the lower federal appellate courts either implicitly or explicitly had as one held that the “prescribed statutory maximum” that triggered *Apprendi* concerns was the maximum penalty assigned to the crime of conviction, not the top of the range assigned to the Sentencing Guidelines’ base offense level for the crime of conviction. The Court’s *Blakely* decision raised questions about the accuracy of that view. *Blakely* applied *Apprendi* principles to strike down a state sentencing guideline enhancement that fell well within the maximum sentence provided for the crime of conviction.

Blakely had kidnapped his estranged wife, bound her with duct tape, stuffed her into a wooden crate in the bed of his truck, and driven her from Washington to Montana. He eventually pled guilty to second degree kidnapping involving domestic violence and use a firearm, a class B felony under Washington State law. Class B felonies were punishable by imprisonment for a maximum of 10 years. Under the applicable Washington statutory sentencing guidelines, the crime was punishable by imprisonment within the “standard range” of 49 to 53 months. A second statutory guideline provision, however, authorized the court to impose a more severe sentence (an “upward departure”), when it found additional aggravating factors unaccounted for in standard range guideline. Upon hearing the circumstances of the offense, the court found that the crime had been committed with “deliberate cruelty,” and sentenced Blakely to a 90 month term of imprisonment. The Washington appellate court found Blakely’s *Apprendi* argument unpersuasive. Although the enhanced sentence was based on judicial findings of fact that carried it beyond the ceiling set by the standard guideline range for the crime of conviction, a sentence of 90 months was still well within the 10 year (120 month) maximum established for such offenses.

The United States Supreme Court disagreed. The question in *Blakely* was simply did the “prescribed statutory maximum” that triggered jury trial and proof beyond a reasonable doubt requirements refer to the 10 year maximum for second degree kidnapping or to the 53 month maximum of the sentencing guidelines’ standard sentencing range? In the mind of the *Blakely* Court “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may imposed *without* any additional facts.” *Blakely*’s guilty plea did not include the facts upon which the sentencing court had relied to enhance his sentence from the maximum 53 months that his plea would have supported to the 90 month enhanced sentence the court had imposed. Thus, “[b]ecause the State’s sentencing procedure did not comply with the Sixth Amendment, petitioner’s sentence is invalid.” The *Blakely* Court expressly declined to comment on the application, if any, of this principle to the federal Sentencing Guidelines. As they had in *Apprendi*, Justices O’Connor and Breyer in dissent expressed concern for the impact of the decision on the federal Sentencing Guidelines.

Fanfan* and *Booker

Fanfan and *Booker* were each convicted of controlled substance offenses. In both instances, application of the Sentencing Guidelines would require sentencing within ranges beyond those supported by the jury verdict alone. The Court granted certiorari for expedited consideration of the two cases as one in order to address two questions: Did *Apprendi/Blakely* apply to the federal Sentencing Guidelines? And if so, how much, if any, of the Guidelines or the Sentencing Act under which they were created, remained viable? The answers were easily stated, but splintered the Court. The principles announced in *Apprendi/Blakely* apply to the federal Sentencing Guidelines. As a consequence, the statutory provisions which made the Guidelines binding on federal trial courts and those which directed federal appellate courts to ensure their binding application must be severed from the Sentencing Reform Act.

The answers required an opinion of two separate parts, each written and with one exception espoused by a different array of the Justices. Justice Ginsburg joined the four *Apprendi/Blakely* “jury right” Justices (Stevens, Scalia, Souter, and Thomas) in the part of the Court’s opinion devoted to the issue of *Apprendi/Blakely*’s application to the federal Sentencing Guidelines; and she then joined the four *Apprendi/Blakely* “judicial sentencing factor” dissenters (Rehnquist, O’Connor, Kennedy, and Breyer) in the part of the Court’s opinion devoted to the issue of severance. Other than Justice Ginsburg, each of the Justices wrote or joined a dissenting opinion.

On the question of application, Justice Stevens’ opinion for the Court rather quickly dispensed with the counter-application arguments. It repeated the ways in which it has described the basic *Apprendi* principle that puts these objections to rest and ended with a view of the principle from yet another angle: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”

The Court’s treatment of the second question may have come as a surprise. There were arguably three more predictable remedies, assuming beforehand that the Guidelines operated impermissibly by permitting judges (by a preponderance of the evidence) to make sentencing decisions constitutionally reserved for the jury. The infirmity might prove fatal to the Guidelines as a whole. Or it might only prove fatal to those Guidelines’ provisions that set the preponderance standard and made the impermissible fact-finding assignment. Or it might simply require that the judge and the Guidelines act only upon those fact determinations found by the jury beyond a reasonable doubt or conceded by the defendant. The second part of the Court’s opinion embraced

none these options. Justice Stevens in part one of the Court's opinion gave a hint of what was to come when he observed that the Guidelines' constitutional defect was a product of their mandatory nature. This suggested the remedy Congress would have preferred and consequently the remedy the Court adopted – only the statutory provisions that made the Guidelines mandatory need be pruned from the system. So concluded the second part of the Court's *Booker* opinion which also explained how the Court anticipated the modified federal sentencing system would operate thereafter and how the opinion applied to Booker and Fanfan.

The Court, writing through Justice Breyer with the concurrence of Chief Justice Rehnquist and Justices O'Connor, Kennedy and Ginsburg, reasoned that Congress would have preferred the demise of the Sentencing Reform Act to a Guidelines system in which the jury made the factual decisions which the Guidelines had originally assigned to the judge. And it would have preferred an advisory Guidelines system over the loss of the Sentencing Reform Act. The Court inferred these preferences (1) from the language of the statute, (2) from Congressional purpose in passing the act, (3) from the fact that the sentencing statutes, read to include the Court's Sixth Amendment requirement, would create a system far more complex than Congress could have intended, (4) from the fact that a reduced judicial role and an increased jury role would exacerbate the problems inherent in plea bargain, (5) from the fact that Congress would not have intended a system that encumbered the imposition of more severe sentences but not of more lenient ones, and (6) from the fact that the most of the act and most of the Guidelines could continue to function effectively and constitutionally by severing but two provisions of the act.

The Court then described the sentencing system that remained after severing 18 U.S.C. 3553(b)(1) which required trial courts to follow the dictates of the Guidelines and 18 U.S.C. 3472(e) which instructed the appellate courts to make sure that they did. Federal judges are no longer bound by the Guidelines, but they remain bound to consider them along with the other considerations identified in section 3553(a). Their sentencing decisions are still subject to appeal by either the government, the defendant, or both under 18 U.S.C. 3742(a),(b). The standard by which such appeals are to be judged is one of "reasonableness" as understood from the jurisprudence that arose under 18 U.S.C. 3742(e)(3) prior to its repeal with respect to departures and the review of sentences for which there was no applicable Guideline. *Booker* applies to all cases on direct review to the extent the sentence imposed gives rise to the constitutional rights announced in *Booker* and within the confines of the "plain error" rule and the "harmless error" doctrine. And what of Mr. Booker and Mr. Fanfan? The Court affirmed the Court of Appeals decision vacating Booker's sentence because the trial court had increased it based on facts other than those found by the jury. "On remand, the District Court should impose a sentence in accordance with [the Court's *Booker*] opinions, and, if the sentence comes before the Court of Appeals for review, the Court of Appeals should apply the review standards set forth in [*Booker*]." Fanfan had been sentenced solely within the facts found by the jury and consequently below the range called for by the Guidelines. The Court vacated Fanfan's sentence and remanded his case to permit the parties to seek resentencing consistent with the Court's opinion, if they elect to do so.

The alignment of the Justices in *Booker* renders predictions of its legacy even more perilous than usual. Why did Justice Ginsburg join the four Justices, who believed *Booker* presented no Sixth Amendment problem, in the part of the Court's opinion designed to solve the problem? Some may find illumination in a case the Court decided two months after *Booker*, *Shepard v. United States*.

Shepard

Shepard arose out of what might be considered unusual circumstances, a factual dispute over the existence and status of prior criminal convictions. *Shepard* involved the application of the federal Armed Career Criminal Act (ACCA), which requires the imposition of a minimum 15-year term of imprisonment for unlawful possession of a firearm, by an individual with three prior serious drug or violent felony convictions. Burglaries are numbered among the qualifying “violent crimes” for purposes of 18 U.S.C. 924(e). The Court has interpreted “burglary” as used here to include any offense consisting of the “unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime,” regardless of how it is captioned.

Shepard had pleaded guilty to possession of a firearm in violation of 18 U.S.C. 922(g)(1). At the time he had five prior convictions (following guilty pleas) under Massachusetts statutes that outlawed breaking and entering into a building, ship, vessel, or vehicle, with the intent to commit a crime. The complaints under which he was charged and plead recited the language of the statute without indicating whether the premises entered were burglary-qualifying buildings or nonqualifying ships, vessels or vehicles. The government offered copies of the police reports and complaint applications to demonstrate that Shepard had previously been convicted of breaking into buildings rather than ships, vessels or vehicles. The trial court found this an impermissible basis for imposition of the mandatory minimum penalty under 18 U.S.C. 924(e); the court of appeals disagreed. The Supreme Court agreed with the district court and reversed. Shepard arguably afforded the Court an opportunity to walk away from the *Almendarez*, prior conviction exception to the *Apprendi* rule. Justice Thomas at least implicitly urged his colleagues to do so; they declined. In a plurality opinion, five members of the Court – Justices Stevens, Scalia, Souter, Ginsburg and Thomas – concluded that in the case of a statute permitting conviction for either qualifying (generic) burglaries or nonqualifying (nongeneric) burglaries, qualification must be shown either in “the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record of this information” or in the charge to the jury. Justice Thomas would reach the result by constitutional necessity; the others as a matter of statutory construction in constitutional avoidance.

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